IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 10 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
GANGABEN POLABHAI - Defendant(s)

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Appearance :
MR AY KOGJE, AGP for Appellant
MR AJ PATEL with MR SR PATEL for Respondents: 1,1.2.3
None for Defendant(s) : 1.2.1,1.2.2

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 02/03/2007
ORAL JUDGMENT

1. Shri A.Y.Kogje, learned AGP for the appellant; Shri A.J.Patel with Shri S.R. Patel, learned counsel for the respondents. The appeal is finally heard.

2. The short facts necessary for disposal of the present appeal are that one Pola Haja, [since deceased], applied to Mamlatdar under Section 37[2] of the Bombay Land Revenue Code [“BLR Code” or “Code” for the sake of brevity] on the ground that the actual measurement of the farm was less by 10 acres and 10 gunthas. He pleaded for declaration under Section 37[2] of the Code that the property belonged to him. The application came to be rejected by the Mamlatdar vide his order dated 3.6.81 in view of the findings that the land belonged to the government. The matter was thereafter taken to the Revenue Court which, vide its order dated 15.9.83 set aside the order of the Mamlatdar and remanded the case. It appears that in the meantime, powers which were earlier conferred

upon the Mamlatdar came to be given to the Deputy Collector. On 15.7.91, the Deputy collector, after reconsidering the entire material available on the record held in favour of the heirs of the deceased Pola Haja. The State did not challenge the said order passed by the Deputy collector, but the Collector took up the matter in suo motu revision being Land Revenue Application No. 5/91. On 27.4.94, the Collector set aside the order passed by the Deputy collector and rejected the claim made by Pola Haja [since deceased].

3. Against the order passed by the Collector, heirs of Pola Haja filed an appeal before the Gujarat Revenue Tribunal, which by its order dated 3.1.95 set aside the order passed by the Collector and restored the order passed by the Deputy Collector. Copy of the said order was received by the department on 22.1.95. I am referring to these dates because at a later stage, it may assume importance.

4. Instead of filing a suit within one year from the date of the said order or at best from the date of receipt of the copy of that order, i.e. on or before 19.1.96, the State probably realizing that they have lost limitation for filing the suit, filed Special Civil Application No. 6533 of 1996 on 15.4.96 in this Court. The said Special Civil Application came to be dismissed on 9/11.9.02. The State thereafter challenged the matter in Letters Patent Appeal No. 193/02, appeal was filed on 29.11.02 and was dismissed on 27.6.03. Still dissatisfied, the State took up the matter before the Apex Court by way of Special Leave Petition [Civil] No.1869 of 2004. However, the said Special Leave Petition came to be dismissed on 8.3.2004.

5. The State thereafter filed Civil Suit No.560 of 2004 in the court of the learned Civil Judge [Senior Division], Rajkot on 23.8.2004. They prayed that the orders passed by the authorities were illegal, the State was the owner of the property and the defendants/respondents have no

right, title or interest in the property.

6. After service of the notice, the defendants appeared and on 8.9.2004 filed an application under Order VII Rule 11 of the Code of Civil Procedure [“CPC” for short]. The objection raised was that as the suit was filed beyond one year and as the suit could not be entertained beyond one year by any Civil Court in view of the bar contained under sub-section[3] of Section 37 of the Code, the suit be held not maintainable. The application was contested by the State Government, but the learned Civil Judge [Senior Division], Rajkot allowed the application vide his order dated 25.11.2004 and rejected the plaint. Being aggrieved by the said order, the State preferred Regular Civil Appeal No. 25/05 but the same came to be dismissed on 9.5.06, therefore, the State has filed this appeal under Section 100 of the Code.

7. The appeal has been admitted for hearing the parties on 7.2.2007 on the following substantial

questions of law.

[i] Whether on the facts and in the circumstances of the case, the plaintiff-State is entitled to take protection and benefit of Section 14 of the Indian Limitation Act, 1963 on the ground that after disposal of the revenue proceedings, they had filed Writ Application, Letters Patent Appeal and had gone to the Supreme Court, and the period spent in these proceedings deserve to be excluded from the limitation?

[ii] Whether on the facts and in the circumstances of the case, the word 'appeal' used in sub-section[3] of Section 37 of the Bombay Land Revenue Code would include all other proceedings where the Court of competent jurisdiction is entitled to set aside the order passed by the Revenue Authorities and if yes, would limitation start from the date the Supreme Court dismissed the application for leave?

8. Shri A.Y. Kogje, learned AGP for the appellant submits that present is a case where an application under Order VII Rule 11[d] of the Code could not be maintained because question

of limitation cannot be taken to be a bar for entertainment of the suit. According to him, question of limitation would not make the suit barred under any other law but the Court, after trial of the suit may refuse to grant the reliefs. His further submission is that present is a case where the plaintiff-State would be entitled to benefits under Section 14 of the Indian Limitation Act, 1963 and present is a case where word “appeal” is to be understood to include any other forum which otherwise is competent to decide the order passed by the Tribunal or the revenue authority. His submission is that in any case, present was a case where the court should have cast an issue on question of limitation and then decided the matter. Placing reliance upon the judgment of the Supreme Court in the matter of *Union of India v. Suresh J. Thanawala [AIR Supreme Court Weekly 2001 SC 4079],* it is submitted that application filed under Rule 11 of Order VII of the CPC was not maintainable. He also submits that the State is ready and willing to

make some amendment in the pleadings. He prays that the dismissal be set aside and the matter be remanded to the trial court for disposal of the matter in accordance with law.

9. Shri A.J. Patel, learned counsel for the respondent placing reliance upon the Single Bench judgment of this Court, which I shall refer to later on, submits that Section 37 read with Section 204 of the Code is complete procedure and Code in itself and if Section 37 is not observed, then the suit cannot be entertained. Referring to the plaintiff's application filed under Order VII Rule 11 of the CPC, it is submitted that in the present matter, the defendants did not raise the question of limitation, but in fact, they were raising the question of sub-section [3] of Section 37 - bar of suit beyond the period of limitation of one year, therefore, if the suit is filed after the expiry of one year, then such suit would be barred and if such suit is barred then, clause [d] of Rule 11 of Order VII

would apply with full force. He also submits that present is a case where special limitation is provided under the Indian Limitation Act. Therefore, in view of Section 29[2] of the Indian Limitation Act, the period prescribed under the common law would not be available. He submits that even under the common law, if the limitation is not set up as a defence and if the court finds that the suit is patently barred by limitation on the showing of the plaintiff himself, then the court would be obliged to dismiss the suit. His further submission is that present is a case where provisions of Section 14 of the Limitation Act would not apply, because, the plaintiff has failed to plead that it was prosecuting earlier litigation with due diligence in relation to same matter in issue, it was prosecuting in good faith in a court which from the defect of jurisdiction or other cause of like nature was unable to entertain it. His submission is that in the year 1960, this High Court made it clear that a suit is required to be filed within one

year and the starting point of limitation would be the date of dismissal of the appeal as required under Section 37[3] of the Code. According to him, if the law is settled in the year 1960 and was reiterated from time to time by the Single Judge Bench or Division Bench judgments of this Court, then, filing of the writ application before the High Court cannot be said to be prosecution of the proceedings in good faith or with due diligence. His further submission is that the matter was finally disposed of by the Tribunal on 3.1.95 and copy was received by the appellant on 20.1.95 and in this set of circumstances, the suit had to be filed on or before 19.1.96 i.e. before the expiry of one year, but the State Government, with able assistance of its officers etc., filed writ application on 15.4.96, that is, after the period for filing the suit was lost. He submits that neither there was diligence nor there was good faith. He also submits that the High Court in a single Bench or Division Bench in Letters Patent Appeal or the Supreme Court in its

appellate jurisdiction could otherwise grant relief in favour of the State, therefore, it cannot be held that the plaintiffs were prosecuting the matter in good faith before the Forum which had no jurisdiction to entertain it. He submits that even otherwise the plaintiff has not pleaded the cause or foundation on which it could claim benefit under the law.

10. Shri Kogje, learned AGP for the appellant submits that the judgment in the matter of *Rukmanibai w/o. Kasturdas Dharamdas v. The State of Gujarat, [1960 GLR 179]* has been overruled by the Supreme Court, therefore, the defendants would not be allowed to take shelter under the said judgment.

11. Shri Patel, learned counsel for the respondents submits that the judgment of the High Court was in two parts; one part related to Section 11 of the Bombay Revenue Jurisdiction Act, 1876 while the other part was in relation to Section 37[2] and Section 37[3] of the Code, according to him,

the Supreme Court only interfered in the matter on the ground that even before exhausting all the remedies as available under the law, a party would be entitled to file the Civil Suit for declaration of his title. His submission is that the findings relating to Section 37[3] have not been set aside by the Supreme Court. Be that as it may. At this stage, I must observe that once the judgment is held to be bad law for one part of the order by the Supreme Court, then even for another part of the judgment it would not be proper for the High Court to place reliance upon the said judgment.

12. Before I come to the arguments, I would prefer to refer to provisions of law which are subject matter of litigation before and interpretation by this Court time and again. Section 37 of the Bombay Land Revenue Code reads as under:-

> ***"37. All public roads, etc., and all lands which are not the property of others belong to the Government.-*** *[1] All public roads, lanes and paths, the bridges, ditches,*

dikes, and fences, on or beside, the same, the bed of the sea and of harbours and creeks below high water-mark, and of rivers, streams, nallas, lakes, and tanks, and all canals, and water-courses, and all standing and flowing water and all lands wherever situated, which are not the property of individuals, or of aggregates of persons legally capable of holding property, and except in so far as any rights of such persons may be established, in or over the same, and except as may be otherwise provided in any law for the time being in force are and are hereby declared to be, with all rights, in or over the same or appertaining thereto, the property of the Government, and it shall be lawful for the Collector subject to the orders of the State government, to dispose of them in such manner as he may deem fit, or as may be authorized by general rules sanctioned by the Government concerned, subject always to the rights of way, and all other rights of the public or of individuals legally subsisting.

***Explanation**:- In this section "high water-mark" means the highest point reached by ordinary spring-tides at any seasons of the year.*

[2] Where any property or any right in or over any properties is claimed by or on behalf of the Government or by any person as against the government, it shall be lawful for the Collector or a survey officer, after formal inquiry of which due notice has been given, to pass an order deciding the claim.

[3] Any suit instituted in any civil Court after the expiration of one year from the date of any order passed under sub-section [1] or sub-section[2], or, if one or more appeals have been made against such order within the period of limitation, then from the date of any order passed by the final appellate authority, as determined according to section204, shall be dismissed [although limitation has not been set up pas a defence] if the suit is brought to set aside such order or if the relief claimed is inconsistent with such order, provided that in the case of an order under sub-section [2] the plaintiff has had due notice of such order.

[4] Any person shall be deemed to have had due notice of an inquiry or order under this section if notice thereof has been given in accordance with rules made in this behalf by the State Government.”

From the perusal of sub-section [2], it would be clear that where any property or any right in or over any properties is claimed by or on behalf of the government or by any person as against the government, the Collector would have jurisdiction to pass an order and decide the claim of the party. Sub-section[3] in substance provides that a party aggrieved by the findings recorded by the Collector or a survey officer would be entitled to challenge the same in Civil Court within one year from the date of the order provided limitation would not start running if an appeal as provided under the law is filed by the aggrieved party and in such case, the limitation would start from the date of the disposal of the appeal. Section 204 of the Bombay Land Revenue Code reads as under:-

> ***"204. Appeal when to lie to the State government.-*** *Subject to the provision in the Bombay Revenue Tribunal Act, 1939 an appeal shall lie to the State Government from any decision or order passed by a Survey Commissioner, except in the case of*

any decision or order passed by such officer on appeal from a decision or order itself recorded in appeal by any officer subordinate to him."

A fair understanding of sub-section [3] of Section 37 would make it clear that the limitation would start running from the date of the disposal of the appeal or from the date of any order passed by the final appellate authority [*emphasis supplied].* Law does not say that the limitation would start running from the date of the order of an authority or the Court which under the law is entitled to set aside the order of Collector or is entitled to interfere with the order. When the law provides that the limitation would start running from the date of any order passed by the final appellate authority, then reading anything beyond what is provided under the law would mean adding wisdom to the law and adding some discretion, which, in fact, legislation did not reserve in favour of the aggrieved party.

13. Section 37[3] further provides that suit is to be filed within one year and if the suit is not filed within the said period of one year, the same shall be dismissed although limitation has not been set up as a defence. The language employed in sub-section[3] is *pari materia* with the language employed in sub-section [3] of the Indian Limitation Act, 1963 when it provides that "although limitation has not been set up as a defence". The law casts a duty upon the Judge or the appellate authority to dismiss the matter once it finds that the cause has been brought before the court or the Tribunal after the period of limitation. Once the limitation is provided under sub-section [3] of Section 37, then the limitation would rule the parties for all practical purposes. Section 29 of the Indian Limitation Act reads as under:-

> *"29. Savings.--[1] Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872 [9 of 1872].*
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> *[2] Where any special or local law*

prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 [inclusive] shall apply only in so far as, and to the extend to which, they are not expressly excluded by such special or local law.

[3] Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.

[4] Sections 25 and 26 and the definition of "easement" in section 2 shall not apply to cases arising in the territories to which the Indian Easements Act, 1882 [5 of 1882], may for the time being extend."

Section 29 of the Indian Limitation Act clearly provides that where any special or local law prescribes for any suit a period of limitation

different from the period prescribed by the Schedule, the provisions of Section 3 thereof shall apply as if such period were period prescribed by the Schedule. In the present case, in light of Section 29 of the Indian Limitation Act, the limitation even for declaration would stand reduced to one year and the running point/starting point of the limitation would be the date of the order of the final appellate authority. When Section 37[3] of the Code itself provides that if the suit is not brought within one year, then the same shall be dismissed although the limitation has not been set up as a defence, then the provisions contained in special law shall supersede general/common law and in case the suit is filed beyond the period of one year, then such suit would be barred under Section 37[3] of the Code. Order VII Rule 11[d] of the CPC provides that the plaint shall be rejected in a case where the suit appears from the statement in the plaint to be barred by any law. In the present matter, on the plaintiff’s own showing, it would clearly appear

that the suit was filed beyond the period of one year from the date of the order passed by the final appellate authority. If such are the statements and such are the pleadings of the parties and the facts are undisputed, then there was no bar against the court in taking up the application filed under Order VII Rule 11[d] of the CPC to consider the question whether the suit appeared to be barred by any law in view of the statements made in the plaint.

14. Shri Kogje, learned AGP, placing reliance upon the judgment of the Supreme Court in the matter of *Union of India v.West Coast Paper Mills Ltd. [AIR 2004 SC 3079]* submits that a fair understanding of Section 14 of the Limitation Act would make it clear that where the period is spent in bona fide litigation, the period so spent should be excluded from the period of limitation.

15. In the said matter, some freight was charged by Railway, but later on, it was declared to be

invalid by the Supreme Court. The plaintiff thereafter filed writ application before the High Court seeking refund of excess freight. The High Court refused to grant mandatory relief in the writ jurisdiction and thereafter, the plaintiff filed suit for recovery of money. In the said set of the facts, the Supreme Court observed that the time spent in such proceedings deserves to be counted out, that is, it is required to be excluded from the period of limitation. For the said purpose, Shri Kogje has also relied upon yet another judgment of the Supreme Court in the matter of *Union of India v. West Coast Paper Mills Ltd.[AIR 2004 SC 1596]*. In the said matter also, the Supreme Court on the facts observed that if a person was contesting the litigation bona fide, then such period can be excluded in view of Section 14 of the Indian Limitation Act.

16. He also places his reliance upon the judgment of the Supreme Court in the matter of *Union of India v.Suresh J. Thanawala [AIR Supreme Court*

Weekly 2001 SC 4079], to submit that present is a case where the matter should be remanded back giving appropriate opportunity to the State Government to bring up necessary pleadings and amend the plaint.

17. Shri Patel, learned counsel for the respondents submits that a fair understanding of Section 14 of the Indian Limitation Act would clearly provide that the requirement of Section 14 is not only to be argued but is to be pleaded and, unless the requirement is pleaded and there are full pleadings, a party cannot be allowed to lead evidence or rely upon a provision of law without factual foundation. According to him, in a case where a party seeks benefit under Section 14 of the Indian Limitation Act, it has to plead that the plaintiff was prosecuting with due diligence some other civil proceedings whether in a court of first instance or appeal or revision and he was prosecuting the proceedings in good faith in a court which from the defect of jurisdiction

or other cause of like nature was unable to entertain it.

18. After going through the pleadings of the parties, I must immediately agree with Mr. Patel that the State Government has not made proper submissions nor had raised proper pleadings on the subject that on what foundation they are entitled to claim benefit under Section 14 of the Act. Even if it is held that the judgment in the case of Rukmanibai, reported in 60 GLR 179 is held to be overruled, then, the two judgments of this Court in the case of Gulam Husen Jivabhai v. State of Gujarat reported in 1966 GLR 280 approved by the Division Bench in the case of Dallumiya Lalmiya Malek v. State of Gujarat, reported in 1971 GLR 668 and in case of Gulam Husen Jivabhai v. State of Gujarat, reported in 1971 GLR 960 have laid down the law and have settled the legal position that the limitation would start running from the date of the order passed by the final appellate authority. In the opinion of this Court, in absence of the pleadings relating to good faith,

diligence and defect of jurisdiction, the State would not be allowed to say that they are entitled to the benefit of Section 14. 'Good faith' are not plain and simple words, but in fact, they carry deep sense in those. One has to show to the Court that he had some belief, some faith and the said belief was based on appropriate appreciation of the legal position or the factual foundation and therefore, the faith was good faith and not ordinary faith. In the present case, the State Government unfortunately did not raise any pleadings that what was the good faith or how the matter was contested diligently or with due diligence before the court which had no jurisdiction. At this stage, it must also be appreciated that the High Court in a single Bench or Letters Patent Court in Appeal or the Supreme Court in its appellate jurisdiction were entitled to grant relief to the present plaintiff, therefore it cannot be said that the High Court or the Supreme Court had no jurisdiction to entertain the writ application or the Letters Patent

Appeal or Special Leave Petition. Section 14 would apply to a case where the Court from the defect of jurisdiction or other cause of like nature is unable to entertain the suit, another civil proceedings or appeal or revision. If the High Court or Supreme Court had jurisdiction to grant relief, but they were of the opinion that relief was not be granted, then present cannot be said to be a case of 'defect of jurisdiction' falling under Section 14 of the Indian Limitation Act.

19. In the matter of *Gopal Sardar v. Karuna Sardar, reported in AIR 2004 SC 3068,* the Supreme Court has clearly observed that if a particular law provides a particular limitation, then such limitation has to be observed and if such limitation is not observed, then right to file the suit would stand foreclosed. In the said suit, the plaintiff came to the court to exercise his right of preemption under the provisions of the West Bengal Land Reforms Act. Under the said Act, a suit is required to be

filed within a period of three months from the date of the transfer, the said plaintiff filed the suit after six years and four years and the Supreme Court held that the suits were not maintainable.

20. Before I proceed on the other subject, I would propose to refer to the judgment of the Supreme Court in the matter of *Ravindranath Sameul Dawson v. Sivakami reported in AIR 1972 SC 730.* The Supreme Court has observed that a person who had resisted the objection regarding non-joinder of the parties at the initial stage and also at the revisional stage and run the risk of proceeding with the suit without impleading the necessary parties, cannot be said to act in good faith because he cannot be said to have acted with due care and attention. According to the Supreme Court, where a person proceeds or acts contrary to law or the settled proposition, then, it cannot be held in his favour that he was acting in good faith. In the present matter, the appellant, in the considered opinion of this

Court, purposefully did not file the suit because the limitation to file the suit had expired either on 2.1.95 [if counted from the date of the order] or on 19.1.95 [if counted from the date of receipt of copy of the order]. Having lost right to file the suit, they devised a new strategy and filed writ application before this court on 15.4.96. If the suit was barred by limitation on such date and assuming the entire period which the appellant had spent since after filing of the writ application up to the date of the disposal of the Special Leave petition by the Supreme Court, is excluded in favour of the appellant and is not counted in the limitation, the period between 2.1.95/20.1.95 up to 15.4.96 [date of filing of writ application] cannot be excluded. The said period is more than one year and if such period cannot be excluded, then present suit would be held to be barred by the period of limitation though it had been filed within one year from the date of the final disposal of the Special Leave Petition.

21. In the matter of Dallumiya Lalmiya Malek v. State of Gujarat *reported in 1971 GLR 668,* Division Bench of this Court has observed in paras-7 and 10 as under:-

> *"7. Mr. Mehta had referred to the decision of the learned single Judge Raju J. in State v. Parshottam, V. Guj. L.R. 738, at page 740. No doubt the learned single Judge has observed that a suit for declaration that the plaintiff is entitled to such a declaration, the order passed by the revenue officer would be a nullity. If the order is a nullity, it is not necessary for the plaintiff to file a suit to have the order set aside. With great respect to the learned Judge, the decision proceeds on an assumption that the Collector lacks jurisdiction to hold an inquiry under sec.37[2]. This assumption is hardly warranted when we look to the plain terms of sec.37[2] which empowers the Collector as competent authority to decide this dispute. Of course, the decision of the Collector has limited finality subject to the decision of the competent civil Court, provided the civil suit is filed within the period of limitation enacted in sec.37[3]*

and after exhausting the appellate remedy as envisaged in sec.11 of the Revenue Jurisdiction Act. To treat such a competent order as nullity which does not attract the bar of limitation or the bar of exhaustation of alternative remedy of appeal would be to make these provisions redundant. It is obvious that the civil Court's jurisdiction is expressly taken away only to that extent. Therefore, there is no substance in the contention of Mr. Mehta that the order an be considered as a nullity, because on that assumption every suit would get out of the bar enacted in sec.37[3] of the Act and sec.11 of the Revenue Jurisdiction Act.

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10. The Legislature has not created any further bar than the two bars which have been created under sec.37[3] of limitation and under sec.11 of the Revenue Jurisdiction Act for exhausting remedy of appeal. As the Civil Court's jurisdiction has to be excluded expressly or by necessary implication, the civil Court's jurisdiction can never be barred by any such assumption as t the form of the suit to be filed in this connection. Even sec.37[3] shows that the Legislature envisaged not only suit for setting aside

the order in the formal inquiry under sec.37[2] but a suit for inconsistent relief. The inquiry into the title in sec.37[2] dispute is of a formal nature. That is why sec.37[3] permits Civil Court in a competent suit to decide this dispute finally provided the suit is filed within the limitation enacted in sec.37[3] and after exhausting the remedies of appeals as envisaged by sec.11 of the Revenue Jurisdiction Act. When there is no such initial bar t the entertainment of a suit, the civil Court on taking evidence would be deciding the dispute of the plaintiff. Once the civil Court decides that this was a private property, the civil Court would be entitled to give a declaration of the plaintiffs; title. Even if a limited right of possession was established without establishing the plaintiffs' title the civil Court would be able to protect this narrow right by injunction. These reliefs in so far as they may be inconsistent with the order of the formal inquiry under sec.37[2] could always be granted on proof of the title or possessory right of the plaintiffs after leading proper evidence before the civil Court. Once the civil Court gives such a finding as t the title or right of possession the order at the formal inquiry which is inconsistent with

these relief would be illegal and would not be binding and even without specifically setting aside the same the civil Court could declare that illegal order not to be binding on the plaintiffs. That was the specific relief claimed in the present suit by the plaintiffs that the order of the Mamlatdar and all other authorities including the Revenue Tribunal holding this suit land A B C D to be of the government be declared to be not binding and that it be declared to be of the plaintiff's ownership and an injunction may be granted. Once title or possessory right would be found in favour of the plaintiffs they would be entitled to any of these reliefs and such reliefs can be given without specific prayer for setting aside the illegal order which would thereafter not remain binding to the plaintiff. Therefore, the declaratory relief that the said order being illegal and binding would be sufficient. A production of these orders would be material when there was a dispute about the contents of the operative part in the final order. Here the plaintiffs' allegations in this connection were in terms admitted by the defendant-State as to what was the finding at the formal inquiry under sec.37[2]. Therefore, even when these orders were not produced if there was no

dispute about the finding therein and when the parties were clearly at an issue and specific issue was raised as to whether all these orders of the revenue authorities including the final order of the Revenue Tribunal were illegal, ultra vires and not binding on the plaintiffs, it would be absolutely technical to dismiss the plaintiff's suit on the ground that there was no specific prayer for setting aside these orders. There could be no prejudice to the defendant-State in such cases even if any amendment was necessary. Even without formal amendment such general relief of setting aside the order could have been given by the learned Single Judge. In the present case, however, it would be sufficient for the plaintiffs to get a declaratory relief that the aforesaid orders are not binding on the plaintiffs, once they are shown to be illegal on establishment of their title or right to possession. Therefore, the learned Single Judge was entirely wrong in holding the suit of the plaintiffs to be incompetent in L.P.A. No.21 of 1966."

In the matter of *Gulam Husen Jivabhai v. State of Gujarat, reported in 1971 GLR 960,* Division bench of this Court has held as under:-

"8.The next contention of Mr. Amin was that the appellate authority contemplated under sub.sec.[3] of sec.37 of the Code was one as contemplated under sec.204 of the Code and that would be the Bombay Revenue Tribunal. The period of limitation in that event would run from the date when the Revenue Tribunal passed an order in the Revision Application No. BRT. 137/54 and the suit would then be in time it being within one year from the date of that decision. We have already set out sub-sec[3] of sec.37 as also secs.. 203 and 204 of the Code hereabove. On a plain reading of sub-sec.[3], it appears abundantly clear that the period of one year provided for instituting a suit in any Civil Court would be from the date of any order passed under sub-sec.[2] of sec.37 of the Code, and since that was so passed by the Survey Officer under sub-sec.[2] of sec.37, we have to see whether any appeals permissible in law against any such order within the period of limitation were made, in which case, the period of one year would run from the date of any order passed by the final appellate authority. Now it is clear and over which there is no dispute that the suit would be barred as filed beyond one

year after the plaintiff's second appeal's decision was given by the Collector-he being the appellate authority. On the other hand, if the appellate authority is taken as a revisional authority such as the Bombay Revenue Tribunal, the suit would be in time it being filed within one year from its order. The question then is whether the Bombay Revenue Tribunal is the final appellate authority and had exercised its powers as such so as to entitle the plaintiff to have starting point of limitation from its order. It is not enough that the Bombay Revenue Tribunal has such powers-both appellate and revision. What is essential is whether an appeal lay to it and that it decided the appeal as a final appellate authority. Now sec.203 of the Code provides for appeals from any such orders passed by the revenue officers under sec. 37 of the Code and as provided therein, an appeal lies from any decision or order passed by a revenue officer under this Act to that officer's immediate superior, whether such decision or order may itself have been passed on appeal from a subordinate officer's decision or order or not. The plaintiff availed of this right of appeal and preferred the first appeal against the order of the Survey Officer before the

Assistant Collector who was his immediate superior and then a second one before the Collector against the decision of the Assistant Collector. Going further, at the relevant time there was no Commissioner's post and therefore there was no question of going in appeal to the Commissioner under sec.204 of the Code. Consequently there was no question of any appeal t the State Government which power had vested in the Bombay Revenue Tribunal under the provisions of that Act. Now, sub-sec.[3] refers to only appeals which may be one or more, permissible under the provisions of the Code. Again the expression used in the same sub-section "from the date of any order passed by the final appellate authority" strengthens the conclusion that what sub-sec.[3] contemplates in the appeals provided under the provisions of the Code and that again the decision of the appellate authorities including no doubt the final appellate authority. It is the appellate authority deciding the matte as such that counts and not any authority howsoever high it may be. In fact, Chapter XIII relates to both appeals and revision. The distinction between the appeals and the revision contemplated under Chapter XIII was obvious before the Legislature and if at all it intended to cover or give wide

meaning to the words 'final appellate authority' as meaning the final authority which has powers to deal with such matters, whether in appeal or revision, it would have used the expression "the final authority" and not "the final appellate authority". The appellate authority has even powers to take additional evidence if it considers necessary as contemplated under sec.209 of the Code. That may not be even available to any authority which has powers to eamine the record and pass orders in exercise of revisional jurisdiction. The scope of interference between an appellate authority and the authority having powers to exercise revisional jurisdiction is also different. The appellate authority would be justified in considering the matter by going into appreciation of evidence etc. as against the exercise of powers in revision contemplated under sec.211 which can only consider the question as to legality or propriety of the order passed and as to the regularity of the proceedings of such officer. It appears, therefore, clear that what is contemplated is the filing of an appeal against any such order provided in law before the appellate authority and the limitation in that event begins to run from the date of any order passed by the final

appellate authority, thereby meaning the last appellate authority which decides the matter.

9. It was urged by Mr. Amin that sec.204 is referred to in sub-sec.[3] of sec.37 of the Code and, according to him, since the post of Commissioner is abolished, the powers of appeal which were in the Commissioner, can be taken to have been given over to the Revenue Tribunal under the Bombay Revenue Tribunal Act, 1939. If we refer to sec.204 again, all that it contemplates is that an appeal can be filed from a decision or order passed by a Commissioner or Survey Commissioner, whether that decision or order was in appeal or otherwise. The Commissioner's post was abolished and no powers are exercised by the Survey Commissioner so that an appeal may lie to the State Government. It is, therefore, clear that there arises no question of an appeal lying to the State Government so as to invoke the jurisdiction of the Revenue Tribunal by virtue of sec. 4 of the Bombay Revenue Tribunal act, 1939 read with serial No.7 of the Schedule annexed thereto, as this sec.204 has to be read subject to the provisions of the Bombay Revenue Tribunal Act, 1939. In other words, as there is no

appeal provided against any such order of the Collector to the State Government under sec. 204 of the Code, the Tribunal could not exercise any such appellate jurisdiction by entertaining appeal against any such decision. Sec.4[1] of the Bombay Revenue Tribunal Act, 1939, provides for the powers and functions of the Tribunal. As stated therein, it shall exercise jurisdiction to entertain appeals an revise decisions in revenue cases as was vested in the State Government immediately before the first day of April 1937 under any law for the time being in force. Then sub-sec.[2] thereof runs thus:-

> *"In particular and without prejudice to the generality of the foregoing provision the Tribunal shall have jurisdiction to entertain appeals and revise decisions--*
>
> *[a] in all revenue cases, arising under the provisions of the enactments specified in the Schedule in which such jurisdiction was vested in the State Government, immediately before the first day of April 1937, and*
>
> *[b] in all cases specified in sec.9."*

Turning then to the Schedule annexed thereto at sr. No.7, the Act referred to is the Bombay Land Revenue Code, 1879 [Bom.V of 1879]. The jurisdiction given to the Tribunal is in respect of appeals and revision in revenue cases under secs.204 and 211 of the Code, as set out in column 9 of the Schedule. We have already pointed out that no appeal was competent against the order of the Collector in the present case before the State Government under sec. 204 of the Code and consequently the Revenue Tribunal could not exercise any such jurisdiction to entertain and hear the appeal. The Revenue Tribunal had entertained an application made by this appellate as a revisional application against the order of the Collector, Ahmedabad, and the powers exercised by it were under sec.211 of the Land Revenue Code read with sec.4 of the Bombay Revenue Tribunal Act. The Revenue Tribunal did not exercise any powers of an appellate authority in hearing that matter as an appeal, so as to cal it a decision by the final appellate authority. It is a decision given by the Tribunal while exercising jurisdiction in revision and that was only under sec.211 of the Code. The order passed by the Revenue Tribunal cannot, therefore, help the appellant in extending the period

of limitation or in saying that the period of one year contemplated in sub-sec.[3] of sec.37 of the Code should run from the date of its order which was passed on 10th April 1956 so as to hold the suit in time. The Courts below were, therefore, right in holding the suit barred by limitation under sec.37[3] of the Code."

22. So far as the judgment of the Supreme Court in the matter of Union of India v. Suresh [supra] is concerned, it proceeded on altogether different assumption. In the said matter, the Supreme Court has observed that question ought to have been raised by way of an issue and appropriate opportunity ought to have been given to the State. In the opinion of this Court, the Supreme Court was not taking up the question of maintainability of the suit in view of the legal provision. In the said matter, the Supreme Court had made certain observations, but being bound by the Division Bench judgment of this Court, I am unable to hold that the suit filed by the plaintiff would be taken to be within the limitation and in view of the facts floating on

the surface of the records the State is entitled to amend the pleadings. I have already held that even if fullest benefit of Sec.14 of the Limitation Act is allowed in favour of the State, then too, the suit would be barred under Section 37[3] of the Code.

23. I would again refer back to Section 37[3] of the Code which clearly provides that any suit instituted in any Civil Court after expiry of one year from the date of any order passed under sub-section [1] or sub-section [2] shall be dismissed if the same is not filed within one year from the date of any order passed by the final appellate authority. In the present matter, undisputedly, the suit was not filed within one year from the date of the order passed by the Tribunal. Even otherwise, the State filed writ application almost after 15 months of the accrual of the cause of action to file the suit.

24. From the observations made by the Division

Bench, it would be clear that the time spent in proceedings other than the appeal cannot be excluded and would not save running of the limitation.

25. The learned courts below, in the opinion of this Court, were not unjustified in taking up the issue under the provisions of Order VII Rule 11[d] of the CPC and did not err in holding that the suit is barred under the provisions of some law i.e. under Section 37[3] of the Code and also did not commit any wrong in dismissing the suit.

26. For the reasons aforesaid, the appeal cannot be held to be maintainable on the first question.

27. So far as the second question is concerned, the question framed by this Court is that whether the word “appeal” used in sub-section [3] of Section 37 of the Code would include all other proceedings where the court of competent jurisdiction is entitled to set aside the

order passed by the revenue authorities. In the matter of Gulam Husen Jivabhai [supra], Division Bench of this Court has held that the time during which a revision application was pending, cannot extend the period of limitation. If statutory revision as provided under Section 211 of the Code would not arrest running of the limitation, then writ petition filed under Article 226 of the Constitution would not stop running of the limitation. In Section 37[3], the words “appeal”/”final appellate authority” have not been used in their loose sense. In fact, there is an intention behind it and the intention simplicitor is that once the matter is discussed and a decision is rendered under sub-section[1] or sub-section[2] of Section 37, then instead of wasting time before this Court or the other, a party aggrieved by the order should immediately come to the Civil Court so that a final declaration is granted by the Civil Court. Limitation of one year has also been provided for specific purpose so that the people may not try to exhume the dead from the graves. A person

who is aggrieved by the order passed by any authority, if has to file an appeal or revision within the period of limitation of one year, which would be sufficiently long time then he should file a suit before the competent authority for redressal of his grievances. The word “appeal” in special circumstances of the case and the purpose for which it has been used in sub-section [3] of Section 37, in the opinion of this Court would not include any proceedings other than the appeal.

28. I would again say that even if everything is to be decided in favour of the State, the State has not filed the suit within one year from the date of the final order passed by the Tribunal nor even challenged the said order before any competent Forum including the High Court within a period of one year. If the inaction or non-action on the part of the State Government has allowed the limitation to run out, then at this stage, the State cannot say that the limitation would start running from 8.3.2004 when the

Special Leave Petition was dismissed.

29. The submission of the State Government is based on misconception of law and misconception of fact, because it does not take into consideration that the right to file the suit was lost on expiry of one year from the date of the order passed by the Tribunal.

30. Taking the case from any angle, I am unable to hold that the courts below were unjustified in dismissing the suit.

31. I find no reason to interfere. The appeal deserves to and is accordingly dismissed. No costs.

32. Let a decree be framed accordingly.

[R.S. GARG, J.]

pirzada/-